82-1886

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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

F. Langwith Berry, Petitioner

v

Earl C. Berger.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT

Thomas M. Burton
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QUESTIONS PRESENTED

A. Where a judgment in one case has successfully been made the basis for a judgment in a second case, does the unappealed second judgment stand as res judicata although the first judgment be subsequently reversed?

B. Does the federal law of res judicata and full faith and credit govern the question of whether a prior state court judgment precludes relitigating any part of the cause of action in a subsequent federal action based both on diversity and federal question jurisdiction?

C. Where the second judgment is entered as a sanction for failure to comply with a discovery order. does it stand on res judicata independent of the reversal of the first judgment?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

F. Langwith Berry, Petitioner

v

Earl C. Berger,* Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

F. Langwith Berry, the petitioner herein, prays that a writ of certiorari issue to review the judgment of The Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on March 28, 1983.

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*Defendants in the action below; Alan Y. Cole, Isaac N. Groner, and Cole and Groner, a partnership, have no interest in this petition.

OPINIONS BELOW

The judgment of The United States District Court for the District of Columbia filed June 29, 1982 which refused to enforce against funds in its registry two final and unappealed California lien judgments of unquestioned jurisdiction was summarily affirmed by the United States Court of Appeals for the District of Columbia Circuit on March 28, 1983, for the reasons stated by the District Court in its memorandum and order, also filed June 29, 1982. The memorandum and order, and judgment of the District Court, and the order of the Court of Appeals are contained in the Appendix. Also in the Appendix are the two California lien judgments which the courts below refused to enforce.

JURISDICTION

The jurisdiction of The Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A. Where a judgment in one case has successfully been made the basis for a judgment in a second case, does the unappealed second judgment stand as res judicata although the first judgment be subsequently reversed?

B. Does the federal law of res judicata and full faith and credit govern the question of whether a prior state court judgment precludes relitigating any part of the cause of action in a subsequent federal action based both on diversity and federal question jurisdiction?

C. Where the second judgment is entered as a sanction for failure to comply with a discovery order, does it stand on res judicata independent of the reversal of the first judgment?

STATEMENT OF THE CASE

After winning a $600,000.00 malicious prosecution case against respondent Earl C.

Berger (Berger) in a California state action, petitioner F. Langwith Berry (Berry) obtained two judgments against Berger in a separate state creditor's action in California, expressly impressing Berger's interest in attorney's fees awarded in March v. U.S. 406 F2d 1306 (1974) with liens in the amount of $600,000.00. Petitioner obtained one lien judgment as a sanction for Berger's failure to comply with the California court's discovery orders. Petitioner obtained the second lien judgment as a summary judgment. Berger appealed the malicious prosecution judgment but did not appeal the two lien judgments. The malicious prosecution summary judgment was later reversed and remanded.

The federal district court having jurisdiction over the funds allowed petitioner to intervene in an action by Berger against his March v. U.S. co-counsel over a fee dispute, but then refused to give full faith and

credit or res judicata effect to the unappealed and unattacked California lien judgments against Berger's March v. U.S. attorney's fees solely because the underlying California malicious prosecution judgment had been reversed.

Petitioner filed his complaint in intervention on September 9, 1980. He reminded Berger on April 23, 1981 that Berger had not answered the complaint. On January 8, 1982, Petitioner submitted to the district court Request to Enter Default, Affidavit for Entry of Default, Request for Default Judgment, Affidavit for Default and Statement, with Certificate of Service showing service upon respondent Berger and all other parties. The court refused to allow them to be filed or lodged and returned the documents to the petitioner. Berger never attacked the lien judgments in California and filed no Rule 60(b) motion or other procedure to seek equitable relief in the court below. Although the

court had invited petitioner to file a motion for summary judgment against Berger, the court on its own accord entered summary judgment against petitioner in the face of Berger's default and in the absence of any attack by Berger on the California judgment or motion to be relieved of it or motion for judgment against Petitioner.

Petitioner appealed the judgment against him to the United States Court of Appeals for the District of Columbia circuit. Berger failed to file a brief in opposition but later asked for summary affirmance based upon the district court's memorandum. Petitioner moved for summary reversal, and on March 28, 1983 the Court of Appeals granted Berger's motion on the grounds stated by the district court.

REASONS FOR GRANTING WRIT

I

THE COURT OF APPEALS DECIDED THE FEDERAL QUESTION OF RES JUDICATA IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The Court of Appeals rejected the federal rule of res judicata in conflict with applicable decisions of this court and contrary to the governing law of the forum. Where the prior action involves only state law matters and later arises in a federal court exercising either diversity or federal question jurisdiction, the forum must follow the federal law of res judicata. Aerojet General v. Askew 511 F2d 710, 715 (5th Cir 1975) Moore's Federal Practice ¶0.311[2] at pp. 3178-3179. The federal law of res judicata precludes equitable relief where the party failed to appeal the second judgment.

Petitioner obtained one[1] of the

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[1]The other lien judgment was obtained as a sanction for Berger's refusal to comply with the California court's discovery order.

California lien judgments, neither of which was appealed, on the basis of a malicious prosecution judgment which was appealed and subsequently reversed. The Court of Appeals adopted the district court's opinion and refused to enforce either unappealed lien judgment due to reversal of the underlying judgment.

> The lien judgments were obtained entirely on the basis of the malicious prosecution judgment subsequently reversed. The injustice of enforcing a lien predicated upon an erroneous judgement is obvious. op. p. 6 (Appendix).

The Court of Appeals reasoning in Berger v. Cole is identical to the Court of Appeals reasoning in Reed v. Allen 54 F2d 713 (D.C. App 1931):

> It is elementary that when a judgment order, or decree is set aside, a dependent judgment or proceeding based upon it for its validity shares its fate and falls with it. 54 F.2d at p. 714.

In Reed v. Allen 286 U.S. 191, 199 (1982) this court reversed, stating:

> "Where a judgment in one case has successfully been made the basis for a judgment in a second case, the second judgment will stand as res judicata, although the first judgment be subsequently reversed. Reed v. Allen 286 U.S. 191, 199 (1932).

This court in Federated Dept. Stores, Inc. v. Moitie, supra reaffirmed that "this court recognizes no general equitable doctrine such as that suggested by the Court of Appeals, which countenances an exception to the finality of a party's failure to appeal. . . ."

The Court of Appeals below, therefore, denied application of the federal rule of res judicata in a way which was directly in conflict with the applicable decisions of this Court. S.Ct. Rule 17.1(c).

II

THE COURT OF APPEALS REFUSED TO GIVE FULL FAITH AND CREDIT TO PETITIONER'S LIEN JUDGMENTS IN A WAY WHICH WAS DIRECTLY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Whether or not a state court judgment is entitled to full faith and credit is a

federal question. Porter v. Wilson, 419 4.2d 254 (2nd Cir. 1969) cert. denied 397 U.S. 1020 (1970).

The final unappealed California lien judgments were enforceable in the intervention below because a judicial lien, and perforce a judgment, valid under California law, must be given full faith and credit in the District of Columbia Federal Court. Art. I § 4 U.S. Constitution, 28 U.S.C. §1738. Moore's Federal Practice, paragraphs .486[1], note 7; .401; Sanders v. Armour Fertilizer Works, 292 U.S. 190 (1934); Reiter v. Universal Marion Corp., 299 F.2d 449 (D.C.Cir. 1962); Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941).

Although debts were to be determined and remaining funds divided by the court below, the California lien judgments were final under California law. Zappettini v. Buckles, 167 Cal 27, 32; 138 P. 696 (1914) California

Code of Civil Procedure. §§ 577, 437c, 558, 636. In Dorey v. Dorey, 609 F.2d 1129, 1132 (5th Cir. 1980) the court said:

> Because the California courts properly exercised jurisdiction over Francis Dorey, there is no question that the California money judgment required enforcement by the federal district court. The California judgment for a sum certain, from which defendant failed to appeal, was unquestionably final and therefore entitled to full faith and credit. 609 F.2d at p. 1132

The district court below, however, claimed that a California court as a matter of equity would not enforce Berry's lien judgments due to the subsequent reversal of the underlying malicious prosecution judgment. But instead of acknowledging that California judgments also have res judicata effect Reich v. Club Universe 125 CA.3rd 965, 178 Cal. Rptr. 473 (1981); Kahn v. Kahn, 68 Cal.App. 3rd 372, 137 Cal. Rptr. 322 (1977), the district court, by refusing to enforce the California judgments, decided not what California law is, but what California law ought to be. "And the proper function of the . . . federal

court is to ascertain what the state law is, not what it ought to be." Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487 (1940).

III

THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SO FAR SANCTIONED THE LOWER COURT'S LIKE DEPARTURE, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In order to reach its desired result, the Court of Appeals seized upon equitable California doctrines of restitution, totally ignoring the issue of res judicata, either as a federal question or as a state law matter.

Under California law, both a summary judgment and a default are entitled to res judicata treatment. California Code of Civil Procedure. §§ 437c, 558, 577, 636. Martens v. Winder, 191 Cal.App.2d 143, 12 Cal.Rptr. 413 (1961). Freeze v. Salot, 122 Cal.App.2d 561, 266 P.2d 140 (1954); Fitzgerald v. Herzer, 78 Cal.App.2d 127, 177 P.2d 364 (1947).

Res judicata applies to the enforcement of state judgments in federal courts. Angel v. Bullington 330 U.S. 183, (1946). The district court acknowledged Reed v. Allen and Federated Department Stores v. Moitie but then devised an equitable theory to relieve Berger from the consequences of the unappealed lien judgments that was expressly precluded by Reed and Moitie. The court did so by analogy to Rule 60(b) but without relying on the federal rule because Berger had made no such motion; and even the court's allowance of the phantom Rule 60(b) motion was not within the "reasonable time" required by the Rule. Morse-Starrett Products Co. v. Steccone 205 F.2d 244, 249 (9th Cir. 1953). Furthermore, "the procedure provided by Rule 60(b) is not a substitute for an appeal" Morse-Starrett Products Co., supra at p. 249. Nor was there any showing that the California lien judgments were inequitable notwithstanding the reversal of the underlying judgment,

and particularly in the light of the California judgment awarded against respondent as sanction. Marshall v. Board of Education, Bergenfield, N.J. 575 F.2d 417, 423 (3rd Cir. 1978). The decision not to appeal is not a basis for Rule 60(b) relief. Marshall, supra, at p. 424. Nor can it be seriously contended that Rule 60(b)(5) was intended to undermine the application of res judicata.[2]

The district court ostensibly resorted to California law for the equitable prerogative to nullify the lien judgments. Invariably, however, the California cases cited by the court involved a prior judgment procured by extrinsic fraud or issued by a court without jurisdiction, neither of which was the case here. Additionally, the lower court relied on cases approving a general equitable power of restitution upon reversal

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[2]The motion "does not affect the finality of a judgment or suspend its operation."

of a judgment on appeal where res judicata was not involved.

It also invoked the Restatement of Judgments § 115. Tentative draft number 6 at p. 30 shows, however, that § 115 is aimed at excuses for default such as negligence or other inadvertence, and not for failure to appeal. Also a judgment based upon a prior judgment subsequently reversed cannot be collaterally attacked. Restatement of Judgments § 44. Finally, "a state will give relief against a valid judgment rendered by a court of another state if and only if it would give relief against a domestic judgment similarly obtained." Restatement of Judgments § 114, Comment d. Such relief is precluded in the District of Columbia forum under Reed v. Allen, supra.

Finally, the district court refused to file petitioner's request for entry of default against Mr. Berger when no answer by Berger was on file and the entry was

mandatory FRCP, Rule 55(a); the district court then entered judgment against petitioner on petitioner's motion against Mr. Berger when Mr. Berger had filed no motion for judgment against petitioner, or directly attacked the lien judgments in either the federal district court or in California; the district court then decided without any hearing Mr. Berger's eligibility for equity before the California court, notwithstanding the entry by that court of one lien judgment as sanction. The radical departure of the district court from the law and from standard procedure and the Court of Appeals' summary affirmance without any indication that it considered petitioner's brief or the record on appeal invokes his court's power of supervision in order to correct the errors below and prevent their recurrence.

IV

ONLY ONE OF TWO LIEN JUDGMENTS WAS PREMISED UPON THE UNDERLYING JUDGMENT SO THAT EVEN WERE THE RATIONALE OF THE COURT BELOW CORRECT, ITS DECISION WOULD NOT APPLY TO THE LIEN JUDGMENT ENTERED AS A SANCTION.

The California default judgment entered September 11, 1978 against the plaintiff was not based upon the malicious prosecution judgment but was an authorized penalty imposed for Mr. Berger's spurning of the California court's discovery orders. Accordingly, it was beyond the reach of the district court's postulate that a California court of equity would be compelled to order restitution due solely to the reversal of the malicious prosecution judgment. The sanction of a default judgment imposed by the California trial court is expressly authorized by California Code of Civil Procedure § 2034(b)(2) (iii). Williams v. Travelers Insurance Company 49 Cal.App. 3rd. 805, 810-811 (1975); Peterson v. City of

Vallejo 259 Cal.App.2d 757, 783-784 (1968); Cornwall v. Santa Monica Dairy Company 66 Cal.App. 3rd 25 (1977); Unger v. Los Angeles Transit Lines 180 Cal.App. 2d 172 (1960). Inasmuch as the California court's sanction presumed an admission of intervenor's entitlement to the money, it was inappropriate for the district court of its own motion to attack directly the judgment as unfair. See Insurance Corp. v. Campagnie des Bauxites __ U.S. __ (1982). 72 L.Ed. 2d 492, 102 S. Ct. _____. Kahn v. Kahn 68 Cal.App. 3rd 372; 137 Cal.Rptr. 332 (1977).

In Kahn v. Kahn, supra, one brother sued another for the equitable recovery of real property conveyed between them to shield it from creditors. The first action was dismissed for failure to comply with the court's discovery orders and the second dismissed because of the res judicata effect of the first judgment.

> A judgment by default is res judicata as to all issues aptly pleaded in the complaint, and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint. Nevertheless, the power of a trial court to apply the "ultimate sanction of default" against a litigant who persists in an outright refusal to comply with his discovery obligations has been consistently upheld.
>
> * * * * *
>
> The ratio decidendi behind such cases appears to be on the theory that a persistent refusal to comply with an order for the production of evidence is tantamount to an admission that the disobedient party really has no meritorious claim or defense to the action. 68 Cal.App. 3rd at p. 382.

The California lien judgment based upon Mr. Berger's default thus stands independent of the reversal of the malicious prosecution judgment and is unaffected by it. Furthermore, since the default judgment essentially reflected Mr. Berger's contempt for the court, he might well be ineligible, for the same court's equitable relief. It was highly presumptuous, therefore, for the District Court and the Court of Appeals to deny

petitoner's enforcement action in intervention.

V

CONCLUSION

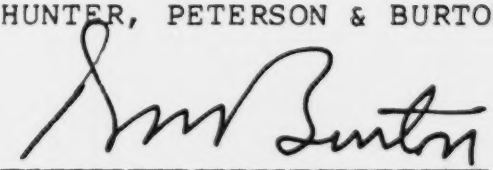
The district court widely departed from the accepted usual course of judicial proceedings by indulging in an equitable exercise both speculative as to California law and directly in conflict with the applicable decisions of this court. This it did by abrogating the settled federal rule and the law of the forum, both of which require that an unappealed foreign state judgment be given res judicata effect and full faith and credit in a subsequent federal action between the same parties for the same cause, notwithstanding the reversal of an underlying foreign judgment. Furthermore, the district court's efforts to do equity for Mr. Berger were particularly inappropriate in the face of a default judgment against him for refusal to obey California discovery

rules and a California court order, and in the light of other evidence before the district court of Mr. Berger's cavalier conduct toward of the California court.

Petitioner respectfully submits that the Court of Appeals had no discretion but to enforce the unappealed California lien judgments against the funds in the registry of the District Court and requests this honorable court to grant a writ of certiorari in order to review and correct the error of the Court of Appeals in summarily affirming the District Court's judgment against the petitioner.

Dated: May 10, 1983.

HUNTER, PETERSON & BURTON



Thomas M. Burton

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 82-1883 September Term, 1982

Earl C. Berger

v.

Alan Y. Cole, et al.

- - - - - - - - - - - - - - - - - -

F. Langwith Berry
Appellant

- - - - - - - - - - - - - - - - - -

BEFORE: Tamm, Ginsburg and Bork, Circuit Judges

O R D E R

On consideration of appellee's motion for summary affirmance and appellant's motion for summary reversal, it is

ORDERED by the Court that summary affirmance is granted. For the reasons cogently stated by the District Court in its June 29, 1982, Memorandum Opinion, intervenor-appellant Berry's claim is untenable; plaintiff-appellee Berger therefore is entitled to expedited action. See Walker v.

Washington, 621 F.2d 541 (D.C. Cir. 1980); United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969).

It is further ORDERED by the Court, sua sponte, that the Clerk withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing. See Local Rule 14, 12 amended June 15, 1982.

Per Curiam

Circuit Judge Bork did not particpate in the foregoing order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EARL C. BERGER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 78-1066
ALAN Y. COLE, et al.,	)	
	)	
Defendants.	)	
	)	

JUDGMENT

This matter is before the court on Intervenor Berry's motion for summary judgment. Upon consideration of the parties' arguments and memoranda, as well as the record in this case, and for the reasons expressed in the accompanying Memorandum Opinion, it is, by the court, this 29th day of June, 1982.

ORDERED, ADJUDGED and DECREED that Intervenor Berry's motion for summary judgment shall be, and hereby is, denied; and it is further

ORDERED, ADJUDGED and DECREED that judgment shall be, and hereby is, entered in

favor of plaintiff with respect to the complaint of Intervenor Berry.

Thomas W. Flannery
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EARL C. BERGER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 78-1066
ALAN Y. COLE, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORDANDUM OPINION

This matter is before the court on Intervenor Berry's motion for summary judgment. Mr. Berry seeks to secure enforcement of a California lien judgment out of funds currently on deposit in the Registry of the Court. For the reasons expressed below, the motion is denied.

Facts

On June 9, 1978, a Superior Court in California entered judgment in a malicious prosecution action in favor of Berry and against Berger in the amount of $600,000 plus interest and costs. Berger filed a notice of appeal from the judgment on July 21, 1978,

but failed to obtain a stay of execution of the judgment.

On June 27, 1978, on the strength of the malicious prosecution judgment, Berry initiated a creditor's action in California Superior Court, with the purpose of impressing a lien on the March v. United States, No. 3437-70 (1970), attorney's fees. On July 19, 1978, the Superior Court entered an order placing a lien on the joint venture interest of Berger to the extent of the judgment debt. On September 11, 1978, on the basis of plaintiff's failure to respond to certain discovery requests, the court entered a default judgment against Berger. Finally, on October 17, 1978, the court entered summary judgment against Berger impressing his interest in the fees with intervenor's judgment.

Complicating matters substantially, on April 16, 1981, Berry's malicious prosecution judgment was reversed by the California Court of Appeals. The court concluded that a

portion of the action was barred by the statute of limitations and that summary judgment was inappropriate with respect to the remainder of the action. The court remanded the case to the Superior Court without expressly ordering that the parties be returned to their pre-litigation positions.

This court granted Berry's renewed motion to intervene on September 9, 1980. Berry was permitted to intervene solely for the purpose of "attempting to enforce the California judgment and creditor's lien against Earl C. Berger in funds now in the court's registry...." The instant motion followed the court's final determination that plaintiff's recovery is limited to one-half of the gross attorneys fees recovered in March v. United States. The motion contends that the court is obligated to enforce the final, unappealed California lien judgments regardless of the reversal of the underlying malicious prosecution judgment.

Discussion

This court is required, of course, to give full faith and credit to a final, valid judgment rendered by a court of competent jurisdiction in a sovereign state. U.S. Const. art. IV § 1; Restatement (Second) of Conflict of Laws §§ 92, 93 (1971). A necessary corollary, however, is that the court may decline to enforce a state judgment if equitable relief could render the judgment a nullity in the state in which it was rendered. Id., at § 115, Comment a; Restatement (Second) of Judgments § 82 (1982). In other words, the judgment need be given no greater effect in the tribunal where enforcement is sought than in the state where the judgment issued.

Close questions as to the enforceability of foreign state judgments are ordinarily resolved in favor of enforcing the judgment or requiring the judgment debtor to return to the rendering state for adjudication of the

continuing validity of the judgment. Annot., 55 A.L.R.2d 673 (1957); Restatement (Second) Conflict of Laws § 1115 (1971). This reflects the principle, consistent with the Full Faith and Credit Clause, that there should be maximum deference to the court issuing the judgment as the most appropriate forum for considering the judgment debtor's request for equitable relief. Other factors relevant to the determination whether to defer to the forum where the judgment originated include the residency and convenience of the litigants, see, e.g., Schoenbrod v. Siegler, 20 N.Y.2d 403, 283 N.Y.S.2d 88. 230 N.E.2d 638 (1967); Hoverstad v. First Nat'l Bank & Trust Co, 76 S.D. 119, 74 N.W.2d 48 (1955), the presence or absence of competing equities that must be weighed, see Bros Inc. v. W.E.Grace Mfg. Co., 320 F.2d 594 (5th Cir. 1963); compare Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937), cert. denied, 303 U.S. 664 (1938) with Baker

v. Erbert, 199 Kan. 59, 427 P.2d 461 (1967), and the existence of evidentiary questions that can most easily be resolved in the judgment state. See Stephens v. Thomasson, 63 Ariz. 187, 160 P.2d 338 (1945); James v. Francesco, 61 N.J. 480, 295 A.2d 633 (1972); Klaiber v. Frank, 9 N.J. 1, 86 A.2d 679 (1952); Consumer Credit Co. v. Bowers, 143 W.Va. 748, 104 S.E.2d 869 (1958).

The judgment liens at issue are valid, final judgments which have never been appealed by Mr. Berger. California Rules of Court, Rule 2a. Contrary to Mr. Berger's assertion, the lien judgments are not automatically void by operation of the reversal of the malicious prosecution judgment. See Reed v. Allen, 286 U.S. 191 (1932); Restatement (Second) Judgments § 41.3 (1982); see also Federated Dept. Stores, Inc. v. Moitie, __U.S.__, 101 S.Ct. 2424 (1981). Accordingly, the court can only refuse to enforce the California lien judgments if it

concludes that a California court, confronted with similar circumstances, would withhold enforcement.

California courts have recognized a number of devices for avoiding onerous and inequitable judgments. First and foremost, parties may employ the analogue of Federal Rule of Civil Procedure 60(b) in order to vacate or set aside a judgment. See Cal. Civ. Proc. Code § 473 (West) (the court "may, upon such terms as may be just, relieve a party from judgment taken against him...."); see generally Hummel v. Hummel, 326 P.2d 542 (1958); Weinberger v. Manning, 123 P.2d 531 (1942). In addition, a litigant may request the court reviewing the underlying judgment to return the parties to the positions they occupied before enforcement of or execution on the judgment. Cal. Civ. Proc. Code § 908 (West); see Holmes v. Williams, 273 P.2d 931 (Cal. App. 1954); Schubert v. Bates, 155 P.2d 793, 30 C.2d 785 (1947). When these options

are unavailable, the party may initiate a suit to set aside an inequitable judgment. See Young v. Young Holdings Corp., 27 Cal. App. 2d 129, 80 P.2d 723 (1938); In Re Marriage of Coffin, 133 Cal. Rptr. 583, 63 Cal. App.3d 139 (1976); Wechsler v. United States, 128 Cal. Rptr. 619, 56 Cal. App. 3d 574 (1976); Preston v. Wyoming Pacific Oil Co., 17 Cal. Rptr. 443, 197 C.A.2d 517 (1962) (power to vacate judgment in separate lawsuit exists independent of statute); cf. Desper v. King, 59 Cal. Rptr. 657, 251 Cal. App. 2d 659 (1967) (when statutory remedy is unavailable, challenge may be made to default judgment in separate equitable action or by motion based on equitable grounds in same action).

Further, it appears that a California court, faced with the circumstances involved here, would refrain from enforcing the judgment liens. It is a venerable tenet of California jurisprudence that "[w]hen a judgment is reversed on appeal, the appellant

is entitled to restitution of all rights from him under the judgment." Greve v. Leger, Limited, 42 Cal. Rptr., 464, 232 Cal. App.2d (1965), rev'd on other grounds, 415 P.2d 824 (1966) (Emphasis supplied); see Coldwell, Banker & Co. v. Dept. of Ins., 162 Cal. Rptr. 487, 102 Cal. App.2d 381 (1980) (reversal of trial court's judgment requires parties to be returned as close as possible to position occupied prior to rendering of erroneous judgment); Levy v. Drew, 50 P.2d 435 (1935) ("[i]t is well settled in California that when a judgment is reversed on appeal the appellant is entitled to restitution of all things taken from him under the judgment....") (Emphasis supplied); Raun v. Reynolds, 18 C.275 (1861) (when a judgment is reversed, it must be treated as if it were never rendered); see also Lapique v. Plummer, 50 Cal. App. 88, 94, 195 P. 293 (1921); Cal. App. 504, 4 P.2d 181 (1931); Thomas V. Lavery, 125 Cal. App. 666, 14 P.2d 158 (1932);

Clarke v. Baird, 98 Cal. 642, 33 P. 756 (1893). Applying this hoary principle, California tribunals consistenly hold that parties must return "money inadvertently paid in satisfaction of a judgment which no longer existed," Department of Public Works v. Richman, 51 Cal. Rptr. 454, 458 (1966); see Coldwell, Banker & Co. v. Dept. of Ins.; Raun v. Reynolds, regardless of the manner in which the money has been procured. Levy v. Drew, 50 P.2d 435 (1935) (the defendant had no right to retain the money collected under the execution after the judgment upon which it was issued had been vacated"). The compelling theory underlying this unbroken line of precedent is that it is manifestly unjust to "permit one who has collected money upon a judgment later reversed to retain the same...." Rogers v. Bill & Vince's Inc., 33 Cal. Rptr. 129, 131 (1963).

Consideration of this uniform body of authority reveals that a California court

would not lend its stamp of approval to the lien judgments at issue here. The lien judgments were obtained entirely on the basis of the malicious prosecution judgment subsequently reversed. The injustice of enforcing a lien predicated upon an erroneous judgment is obvious. The survey of California law set out above demonstrates that a California court would do its utmost to avoid this injustice by returning the parties to the positions they occupied before the underlying judgment was rendered. Since the lien judgments flowed directly and exclusively from the malicious prosecution judgment, restoration of the parties to their initial positions necessarily includes a refusal to enforce the lien judgments.

In fact, a decision by this court to enforce the lien judgments would almost certainly be negated by subsequent action in California. If funds presently on deposit are actually released to Berry in

satisfaction of his lien, the California authorities cited above suggest that Berger could successfully initiate and prosecute an action for restitution of the money. Thus, allowing Berry to now enforce his lien would not only run counter to the equities which have motivated California courts but would obligate a California tribunal to become embroiled in a basically unnecessary legal proceeding. It is clear, therefore, that a refusal to enforce the lien judgments involved here would be most consistent with the interests of comity and deference that underlie the Full Faith and Credit Clause.

In sum, this court is required to give a California judgment only that full faith and credit which a California court would lend to the judgment. Following a review of relevant California law, the court concludes that a California court would, on equitable grounds, decline to enforce the lien judgments relied upon by the intervenor despite the apparent

validity of those judgments. 1/ Accordingly, the court also refrains from enforcing the liens on the March attorneys fees and denies intervenor Berry's motion for summary judgment.

An appropriate Judgment accompanies this Memorandum Opinion.

Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

1/ Because analysis of whether a California court would approve of the lien judgments at issue does not present a close issue, there is no need to consider the other factors material to the decision whether to enforce a judgment rendered by another state. If those factors were scrutinized, they would undoubtedly favor a refusal to enforce the lien judgments. The grounds for challenging the lien judgment do not require consideration of evidentiary materials easily accessible to a California court. In addition, neither of the principle adversaries, Berger or Berry, has complained that this is an inconvenient forum for resolution of the matter at hand. Finally, the court can discern no important competing equities which favor enforcement of the lien judgments. See Michigan Surely Co. v. Service Machinery Corp., 277 F.2d 531 (5th Cir. 1960).

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Telephone Number (415) 981-5550

Attorneys for Plaintiff
F. LANGWITH BERRY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

F. LANGWITH BERRY, Plaintiff, v. EARL C. BERGER, ISAAC N. GRONER, ALAN Y. COLE, and COLE AND GRONER, a partnership and/or professional corporation, individually and as members of a joint venture, and the joint venture composed of the aforesaid members, Defendant.	NUMBER 403647 JUDGMENT

This cause came on to be heard before the Honorable John R. Kennedy, presiding in Department 7 of the above-entitled court, on

September , 1978. Hancock, Rothert & Bunshoft, by Thomas M. Burton, appeared as attorney for plaintiff. Defendant EARL C. BERGER has been regularly served with the following: (1) process, (2) plaintiff's Request for Production of Documents, (3) this court's Orders of July 20, 1978 denying defendant BERGER's objections to Production of Documents and compelling defendant BERGER to produce documents, and (4) plaintiff's "Notice of Motion for Order that Facts be Taken to be Established, That Defendant BERGER's Answer be Stricken and Default Judgment be Entered Against Him, and for Reasonable Costs and Attorneys' Fees." Defendant BERGER having failed to comply with the above-mentioned Request for Production, or with this court's discovery Orders, and having failed to respond or appear at the above-mentioned September 1, 1978 regularly-noticed hearing, and evidence having been introduced and the default of said defendant

having been duly entered in open session of this court:

IT IS THEREFORE ORDERED, adjudged, and decreed that defendant EARL C. BERGER have judgment entered against him as follows:

1. That he be permanently enjoined from disposing, spending, or otherwise dealing with any funds received by him from defendants COLE, GRONER, or COLE AND GRONER arising out of the judgment in March v. United States (D.D.C., No. 3437-70), and that BERGER inform this court immediately of any such funds heretofore or hereinafter received;

2. That his interest in the attorneys' fees awarded in March v. United States (D.D.C., No. 3437-10) is hereby charged, pursuant to Cal. Corp. C. Section 15028, with a lien in the amount of SIX HUNDRED THOUSAND DOLLARS ($600,000.00) plus

interest and costs, in favor of plaintiff F. LANGWITH BERRY;

3. That he is ordered to pay plaintiff the sum of FIVE HUNDRED DOLLARS ($500.00) as and for reasonable expenses and attorneys' fees incurred in obtaining sanctions for defendant BERGER's failure to comply with discovery proceedings.

The Clerk is ordered to enter the judgment.

DATED: Sep. 11, 1978

John R. Kennedy
JUDGE

THOMAS M. BURTON
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HANCOCK, ROTHERT & BUNSHOFT
100 Bush Street, Suite 1600
San Francisco, California 94104

Telephone: (415) 981-5550

Attorneys for Plaintiff
F. LANGWITH BERRY

IN THE SUPERIOR COURT OF

THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

F. LANGWITH BERRY, Plaintiff, v. EARL C. BERGER, ISAAC N. GRONER, ALAN Y. COLE and COLE AND GRONER, a partnership and/or professional corporation, individually and as members of a joint venture, and the joint venture composed of the aforesaid members, Defendants.	NO. 403647 SUMMARY JUDGMENT AGAINST THE DEFENDANT EARL C. BERGER ALONE.

Plaintiff's motion for summary judgment against the defendant EARL C. BERGER came

regularly on for hearing before this court on September 15, 1978. Thomas M. Burton of Hancock, Rothert & Bunshoft appeared for the plaintiff and the defendant appeared in person. The court, having heard argument and having taken judicial notice as requested by the plaintiff on July 14, 1978, of all of the files and records in Action No. P32130 entitled Berry v. Berger as to which this court entered judgment on June 9, 1978, and being fully advised in the premises, now hereby

ORDERS that judgment be entered in favor of F. LANGWITH BERRY and against EARL C. BERGER as follows:

1. That he be permanently enjoined from disposing, spending, or otherwise dealing with any funds received by him from defendants COLE, GRONER, or COLE AND GRONER arising out of the judgment in March v. United States (D.D.C., No. 3437-10), and that BERGER inform this court immediately of any

such funds heretofore or hereinafter received;

2. That his interest in the attorney's fees awarded in March v. United States (D.D.C., No. 3437-10) is hereby charged, pursuant to Cal. Corp. C. Section 15028, with a lien in the amount of SIX HUNDRED THOUSAND DOLLARS ($600,000.00) plus interest and costs, in favor of plaintiff F. LANGWITH BERRY.

The clerk is advised to enter the judgment.

DATED: Oct 12, 1978

JOHN R. KENNEDY
Judge of the Superior Court

PROOF OF SERVICE BY MAIL (C.C.P. 1013a)

STATE OF CALIFORNIA)
) ss
COUNTY OF SANTA CLARA)

I am a citizen of the United States and a resident of Santa Clara County; I am over the age of eighteen and not a party to the within above-entitled action; my business address is 99 Almaden Blvd., Suite 1001, San Jose, California 95113.

On the date below, I served the within documents on the interested parties appearing in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as written below.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 19, 1983, at San Jose, California.

Thomas M. Burton

Addresses:

Clerk
United States District Court
U. S. Courthouse
500 Indiana Avenue
Washington, D.C.

U.S. Court of Appeals
Office of the Clerk
717 Madison Pl., N.W.
Washington, D.C.

Daniel L. O'Connor, Esq.
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016

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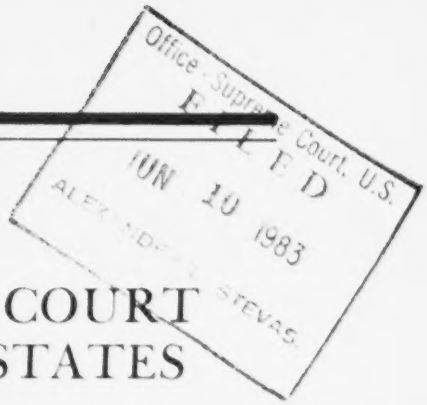

No. 82-1886

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

F. LANGWITH BERRY, Petitioner

v.

EARL C. BERGER, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Daniel L. O'Connor, Jr.
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Telephone: (202) 686-0995

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Berger v. Cole et al.
USDC D.C., CA No. 78-1066, Memorandum Opinion filed June 29, 1982 (unreported—App. B of Petition)

Federated Department Stores, Inc. v. Moitie et al.,
452 US 394, 69 L. Ed 2d 103, 101 S.Ct. 2424 (1982).

IN THE SUPREME COURT OF THE UNITED STATES

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EARL C. BERGER, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court filed June 29, 1982 (App. B of Petition) is unreported. The Order of the Circuit Court of Appeals for the District of Columbia Circuit filed March 28, 1983 (App. A of Petition) is unreported.

JURISDICTION

The Jurisdiction requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Under the doctrine of res judicata do the fruits of an erroneous judgment forever enure to the benefit of a party after reversal?

STATEMENT OF THE CASE

Petitioner's presentation of the factual basis of this petition is substantially accurate and is accepted by the respondent.

ARGUMENT

"Berry's claim is untenable," so said the U.S. Court of Appeals for the District of Columbia Circuit in its unreported Order of March 28, 1983. (App. A of Petition)

The United States Supreme Court should not have its good office used as an instrument to be manipulated so that an unsuccessful litigant may reap a windfall. Yet, after reading petitioner's brief, one cannot escape the fact that this is the bottom line of his argument.

Petitioner relies primarily upon this Court's decision in *Federated Department Stores, Inc. et al.* v. *Marilyn Moitie and Floyd R. Brown, et al.*, 452 US 394, 69 L. Ed. 2d 103, 101 S Ct 2424 (1981).

In relying upon *Moitie,* Petitioner overlooks the principal question raised by the majority of this Court which was:

> . . . whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata (452 US 395).

In narrowing this issue, the Court did not foreclose recognition that *"exceptions"* to the doctrine of res judicata do exist and may be applied in a proper set of circumstances.

The real thrust of the *Moitie* decision is found at 452 US 400 where this Court invoked the strict application of the res judicata doctrine so as to prevent a "windfall" to the litigants who sought an unwarranted advantage. An *exception* to the strict application of the doctrine must be made in favor of Respondent in this appeal, for Petitioner would otherwise reap a windfall and would be unjustly enriched.

Counsel for Respondent would do violence to the Memorandum Opinion (App. B of Petition, unreported) of U.S. District Judge Thomas A. Flannery if an attempt was made to improve upon it. For this reason, Counsel adopts

Judge Flannery's opinion as the basis for Respondent's argument and herewith quotes it in full.

MEMORANDUM OPINION

This matter is before the Court on Intervenor Berry's motion for summary judgment. Mr. Berry seeks to secure enforcement of a California lien judgment out of funds currently on deposit in the Registry of the Court. For the reasons expressed below, the motion is denied.

Facts

On June 9, 1978, a Superior Court in California entered judgment in a malicious prosecution action in favor of Berry and against Berger in the amount of $600,000 plus interest and costs. Berger filed a notice of appeal from the judgment on July 21, 1978, but failed to obtain a stay of execution of the judgment.

On June 27, 1978, on the strength of the malicious prosecution judgment, Berry initiated a creditor's action in California Superior Court, with the purpose of impressing a lien on the *March v. United States,* No. 3437-70 (1970), attorney's fees. On July 19, 1978, the Superior Court entered an order placing a lien on the joint venture interest of Berger to the extent of the judgment debt. On September 11, 1978, on the basis of plaintiff's failure to respond to certain discovery requests, the court entered a default judgment against Berger. Finally, on October 17, 1978, the court entered summary judgment against Berger impressing his interest in the fees with intervenor's judgment.

Complicating matters substantially, on April 16, 1981, Berry's malicious prosecution judgment was reversed by the California Court of Appeals. The court concluded that a portion of the action was barred by the statute of limitations and that summary judgment was inappropriate with

respect to the remainder of the action. The court remanded the case to the Superior Court without expressly ordering that the parties be returned to their pre-litigation positions.

This court granted Berry's renewed motion to intervene on September 9, 1980. Berry was permitted to intervene solely for the purpose of "attempting to enforce the California judgment and creditor's lien against Earl C. Berger in funds now in the court's registry . . ." The instant motion followed the court's final determination that plaintiff's recovery is limited to one-half of the gross attorneys fees recovered in *March v. United States*. The motion contends that the court is obligated to enforce the final, unappealed California lien judgment regardless of the reversal of the underlying malicious prosecution judgment.

Discussion

This court is required, of course, to give full faith and credit to a final, valid judgment rendered by a court of competent jurisdiction in a sovereign state. U.S. Const. art. IV § 1; Restatement (Second) of Conflict of Laws §§ 92,93 (1971). A necessary corollary, however, is that the court may decline to enforce a state judgment if equitable relief could render the judgment a nullity in the state in which it was rendered. *Id.*, at § 115, Comment a; Restatement (Second) of Judgments § 82 (1982). In other words, the judgment need be given no greater effect in the tribunal where enforcement is sought than in the state where the judgment issued.

Close questions as to the enforceability of foreign state judgments are ordinarily resolved in favor of enforcing the judgment or requiring the judgment debtor to return to the rendering state for adjudication of the continuing validity of the

judgment. Annot., 55 A.L.R.2d 673 (1957); Restatement (Second) Conflict of Laws § 115 (1971). This reflects the principle, consistent with the Full Faith and Credit Clause, that there should be maximum deference to the court issuing the judgment as the most appropriate forum for considering the judgment debtor's request for equitable relief. Other factors relevant to the determination whether to defer to the forum where the judgment originated include the residency and convenience of the litigants, *see, e.g., Schoenbrod v. Siegler,* 20 N.Y.2d 403, 283 N.Y.S.2d 88.230 N.E.2d 638 (1967); *Hoverstad v. First Nat'l Bank & Trust Co.,* 76 S.D. 119, 74 N.W.2d 48 (1955), the presence or absence of competing equities that must be weighed, *see, Bros Inc. v. W.E. Grace Mfg. Co.,* 320 F.2d 594 (5th Cir. 1963); *compare Wyman v. Newhouse,* 93 F.2d 313 (2d Cir. 1937), *cert. denied,* 303 U.S. 664 (1938) with *Baker v. Erbert,* 199 Kan. 59, 427 P.2d 461 (1967), and the existence of evidentiary questions that can most easily be resolved in the judgment state. *See Stephens v. Thomasson,* 63 Ariz. 187, 160 P.2d 338 (1945); *James v. Francesco,* 61 N.J. 480, 295 A.2d 633 (1972); *Klaiber v. Frank,* 9 N.J. 1, 86 A.2d 679 (1952); *Consumer Credit Co. v. Bowers,* 143 W.Va. 748, 104 S.E.2d 869 (1958).

The judgment liens at issue are valid, final judgments which have never been appealed by Mr. Berger. California rules of Court, Rule 2a. Contrary to Mr. Berger's assertion, the lien judgments are not automatically void by operation of the reversal of the malicious prosecution judgment. *See Reed v. Allen,* 286 U.S. 191 (1932); Restatement (Second) Judgments §41.3 (1982); *see also Federated Dept. Stores, Inc. v. Moitie,* ___U.S.___, 101 S.Ct. 2424 (1981). Accordingly, the court can only refuse to enforce the California lien judgments if it concludes that a California

court, confronted with similar circumstances, would withhold enforcement.

California courts have recognized a number of devices for avoiding onerous and inequitable judgments. First and foremost, parties may employ the analogue of Federal Rule of Civil Procedure 60(b) in order to vacate or set aside a judgment. See Cal. Civ. Proc. Code §473 (West) (the court "may, upon such terms as may be just, relieve a party from judgment taken against him ..."); *see generally Hummel vs. Hummel,* 326 P.2d 542 (1958); *Weinberger v. Manning,* 123 P.2d 531 (1942). In addition, a litigant may request the court reviewing the underlying judgment to return the parties to the positions they occupied before enforcement of or execution on the judgment. Cal. Civ. Proc. Code § 908 (West); *see Holmes v. Williams,* 273 P.2d 785 (1947). When these options are unavailable, the party may initiate a suit to set aside an inequitable judgment. *See Young v. Young Holdings Corp.*, 27 Cal. App. 2d 129, 80 P.2d 723 (1938); *In Re Marriage of Coffin,* 133 Cal. Rptr. 583, 63 Cal. App.3d 139 (1976); *Wechsler v. United States,* 128 Cal. Rptr. 619, 56 Cal. App. 3d 574 (1976); *Preston v. Wyoming Pacific Oil Co.,* 17 Cal. Rptr. 443, 197 CA 2d 517 (1962) (power to vacate judgment in separate lawsuit exists independent of statute); *cf. Desper v. King,* 59 Cal. Rptr. 657, 251 Cal. App.2d 659 (1967) (when statutory remedy is unavailable, challenge may be made to default judgment in separate equitable action or by motion based on equitable grounds in same action).

Further, it appears that a California court, faced with the circumstances involved here, would refrain from enforcing the judgment liens. It is a venerable tenet of California jurisprudence that "[w]hen a judgment is reversed on appeal,

the appellant is entitled to restitution of *all rights* from him under the judgment." *Greve v. Leger, Limited*, 42 Cal. Rptr., 464, 232 Cal. App.2d (1965), *rev'd on other grounds*, 415 P.2d 824 (1966) (Emphasis supplied); *see Coldwell, Banker & Co. v. Dept. of Ins.*, 162 Cal. Rptr. 487, 102 Cal. App.2d 381 (1980) (reversal of trial court's judgment requires parties to be returned as close as possible to position occupied prior to rendering of erroneous judgment); *Levy v. Drew*, 50 P.2d 435 (1935) ("[i]t is well settled in California that when a judgment is reversed on appeal the appellant is entitled to restitution of *all things* taken from him under the judgment . . .") (Emphasis supplied); *Raun v. Reynolds*, 18 C.275 (1861) (when a judgment is reversed, it must be treated as if it were never rendered); *see also Lapique v. Plummer*, 50 Cal. App. 88, 94, 195 P. 293 (1921); Cal. App. 504, 4P.2d 181 (1931); *Thomas v. Lavery*, 125 Cal. App. 666, 14 P.2d 158 (1932); *Clarke v. Baird*, 98 Cal. 642, 33 P.756 (1893). Applying this hoary principle, California tribunals consistently hold that parties must return "money inadvertently paid in satisfaction of a judgment which no longer existed," *Department of Public Works v. Richman*, 51 Cal. Rptr. 454, 458 (1966); *see Coldwell, Banker & Co. v. Dept. of Ins.; Raun v. Reynods*, regardless of the manner in which the money has been procured. *Levy v. Drew*, 50 P.2d 435 (1935) (the "defendant had no right to retain the money collected under the execution after the judgment upon which it *was issued had been* vacated"). The compelling theory underlying this unbroken line of precedent is that it is manifestly unjust to "permit one who has collected money upon a judgment later reversed to retain the same . . ." *Rogers v. Bill & Vince's Inc.*, 33 Cal. Rptr. 129, 131 (1963).

Consideration of this uniform body of authority reveals that a California court would not lend its stamp of approval to the lien judgments at issue here. The lien judgments were obtained entirely on the basis of the malicious prosecution judgment subsequently reversed. The injustice of enforcing a lien predicated upon an erroneous judgment is obvious. The survey of California law set out above demonstrates that a California court would do its utmost to avoid this injustice by returning the parties to the positions they occupied before the underlying judgment was rendered. Since the lien judgments flowed directly and exclusively from the malicious prosecution judgment, restoration of the parties to their initial positions necessarily includes a refusal to enforce the lien judgments.

In fact, a decision by this court to enforce the lien judgments would almost certainly be negated by subsequent action in California. If funds presently on deposit are actually released to Berry in satisfaction of his lien, the California authorities cited above suggest that Berger could successfully initiate and prosecute an action for restitution of the money. Thus, allowing Berry to now enforce his lien would not only run counter to the equities which have motivated California courts but would obligate a California tribunal to become embroiled in a basically unnecessary legal proceeding. It is clear, therefore, that a *refusal* to enforce the lien judgments involved here would be most consistent with the interests of comity and deference that underlie the Full Faith and Credit Clause.

In sum, this court is required to give a California judgment only that full faith and credit which a California court would lend to the judgment. Following a review of relevant California law, the court concludes that a California

court would, on equitable grounds, decline to enforce the lien judgments relied upon by the intervenor despite the apparent validity of those judgements.[1]

Accordingly, the court also refrains from enforcing the liens on the *March* attorneys fees and denies intervenor Berry's motion for summary judgment.

An appropriate Judgment accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery

United States District Judge

Following Judge Flannery's Opinion, the United States Court of Appeals for the District of Columbia Circuit made short-shift of Petitioner's appeal to that court. Its Order (App. A of Petition—Unreported) rejected the appeal as follows:

ORDER

On consideration of appellee's motion for summary affirmance and appellant's motion for summary reversal, it is

ORDERED by the Court that summary affirmance is granted. For the reasons cogently stated by the District Court in its June 29, 1982,

[1]Because analysis of whether a California court would approve of the lien judgments at issue does not present a close issue, there is no need to consider the other factors material to the decision whether to enforce a judgment rendered by another state. If those factors were scrutinized, they would undoubtedly favor a refusal to enforce the lien judgments. The grounds for challenging the lien judgment do not require consideration of evidentiary materials easily accessible to a California court. In addition, neither of the principle adversaries, Berger or Berry, has complained that this is an inconvenient forum for resolution of the matter at hand. Finally, the court can discern no important competing equities which favor enforcement of the lien judgments. *See Michigan Surety Co. v. Service Machinery Corp.*, 277 F.2d 531 (5th Cir. 1960).

Memorandum Opinion, intervenor-appellant Berry's claim is untenable; plaintiff-appellee Berger, therefore, is entitled to expedited action. *See Walker v. Washington*, 621 F.2d 541 (D.C. Cir. 1980); *United States v. Allen*, 408 F.2d 1287 (D.C. Cir. 1969).

CONCLUSION

It is obvious that this petition is without merit; that petitioner is seeking a windfall and unjust enrichment and is asking this Court to enforce a lien which is not enforceable under California law. The appellate court aptly said: "Berry's claim is untenable."

The petition should be denied.

Dated: June 10, 1983

DANIEL L. O'CONNOR, JR.
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the annexed BRIEF FOR RESPONDENT IN OPPOSITION was mailed, postage prepaid, to Thomas M. Burton of Hunter, Peterson and Burton, Suite 1001, Union Bank Building, 99 Almaden Boulevard, San Jose, California 95413, attorney for Petitioner, F. Langwith Berry, this 10th day of June, 1983.

DANIEL L. O'CONNOR, JR.
Attorney for Respondent

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Suite 400
Washington, D.C. 20016
Telephone: (202) 686-0995